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European and German Security Policy and International Terrorism

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German security policy cannot be separated from that of the European Union, especially when it comes to border controls as one of its principal elements. Since the 1970s, the European Union (then the European Economic Community (EEC)) has been engaged in harmonizing the Member States' security policy, which has, in the light of the ongoing European integration, become one of its primary goals, especially with regard to the enlargement of the European Union, which took place on May 1, 2004. The importance of both European and transatlantic cooperation in this field cannot therefore be overemphasized, particularly since the events of September 11, 2001, which have confronted all States with a new threat.[1]

The most prominent feature of the threat posed by international terrorism is the changed profile of its perpetrators: Al Qaida, and the persons and organizations associated with it, is not confined to nations, regarding either its members or its aims. The offenders are recruited from various countries and together constitute an internationally organized structure of terrorism, of which all Western societies can be victims, as witnessed last in Madrid. From a sociological point of view, this international terrorist structure differs from all known criminal groups. The

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spectrum reaches from illiterate religious fanatics to highly educated businessmen with international experience.[2] The focus of this article shall therefore be on the development of border controls and their effectiveness in the fight against international terrorism.

Legal Regime for Security Policy and Border Controls in Europe and Germany

The ongoing European integration has brought Europe's citizens not only economical, but also great personal freedom, a development which found its climax in the introduction of EU citizenship by the Maastricht Treaty on European Union.[3] But by granting those freedoms, a need for coordinating justice and home affairs became obvious. Starting with the Naples Agreement on the Cooperation of Customs Services in 1967,[4] informal governmental cooperation in the area of justice and home affairs has evolved. In this context, the TREVI Group,[5] mandated to combat terrorism, illegal immigration and organized crime, and composed of executives of the Member States' respective authorities, was created. The Single European Act of 1986,[6] which introduced the concept of the Single Market, brought about the need to create a balance between market freedoms and security interests, especially as far as controls of the EEC's external borders and the creation of a common European asylum and immigration policy were concerned.

The Schengen Regime

Due to the difficult and tedious process of reconciling policies in the area of justice and home affairs, France, Germany and the Benelux countries concluded the 1985 Schengen Agreement[7] with a view to abolishing controls at the internal borders, harmonizing measures in the area of visas and asylum policy, and creating police and judicial cooperation. The 1990 Schengen Implementation Agreement (SIA)[8] codified the abolishment of internal border controls, laid down the procedure for controls at the external borders, and provided common rules for issuing short-term visas and for determining jurisdiction for asylum requests according to the Dublin Agreement.[9] The SIA came into force in 1995. The most interesting features of the SIA for the topic of this article are the introduction of cross-border pursuit and shadowing and of the "Schengen Information System" (SIS). The latter is a computerized network allowing the Member States' police authorities to exchange data on wanted persons as well as stolen goods, e.g., cars. The weak point of the SIS is that it is designed to serve only 18 Member States. Therefore, the European Community Council, at the urging of the Schengen Executive Council[10] (the primary organ created by the Schengen Agreements), directed that a second-generation Schengen Information System (SIS II) be developed that would take into

account new developments in information technology and update the system with new capacity criteria.[11] However, SIS II has not yet been implemented, due to technical difficulties. The foregoing agreements, as well as the legal instruments decreed by the Schengen organs, collectively constitute the Schengen Regime, which is now applicable in all EU Member States except the United Kingdom and Ireland.[12]

The Treaty of Amsterdam,[13] which first stipulated the creation of an area of freedom, security and justice as one of the EU's goals,[14] incorporated the Schengen Regime into the European Union.[15] The provisions of the Schengen Regime were transferred in 1999[16] to the respective legal bases of the Treaty Establishing the European Community (TEC)[17] and the Treaty on European Union (TEU).[18] A new Title IV on visa, asylum, immigration and other policies related to the free movement of persons was inserted into the TEC. Since then, the statutory basis for EC and EU measures in the areas of justice and home affairs that was before to be found in the Schengen Regime can now be found in the TEC and in the TEU.[19] Accordingly, the Schengen Regime forms part of the *acquis communautaire*, which the accession States must adopt. Exceptions apply only to the United Kingdom and Ireland as States that originally did not sign the Schengen Agreements, as well as Denmark, who opted out of some parts of the Maastricht Treaty establishing the European Union in 1992.

Since most of the measures adopted on the grounds of TEC/TEU provisions, except for regulations, need to be transformed into national law by the Member States, both EC/EU measures and national laws coexist, but also intertwine. Sparked by the innovations of the Amsterdam Treaty, the Council of the European Union decided, while meeting in Tampere, Finland in 1999, that the creation of an area of freedom, security and justice should be given the same importance as the realization of the Single Market. The area of security thus should comprise fighting cross-border crime, drug trafficking, illegal immigration and terrorism as the negative aspects resulting from the area of freedom. The European Commission was mandated to create a scorecard, which, at regular intervals, would show the progress in creating an area of freedom, security and justice.

Europol-Agreement

Police cooperation between Member States was and is to date a significant aspect of an area of security. Therefore, the European Drugs Unit was set up as early as 1995 as part of the TEU's police and judicial cooperation,[20] enabling Member States to exchange and analyze information on criminal acts and assisting national police authorities in combating crime. However, the Drugs Unit was subsequently mandated with further competencies in the areas of drug trafficking, illegal dealing of radioactive and nuclear materials, illegal immigration, trafficking in human

beings, illegal moving of automobiles and money laundering. The exchange of information with the Drugs Unit was carried out via liaison officers in each Member State, who had to comply with the respective national laws protecting personal data; therefore personal data could not be stored directly with the Drugs Unit. In 1999, the European Drugs Unit was replaced by the European Police Office (Europol), which was established on the basis of the 1995 Europol Agreement.[21] Europol has essentially the same competencies as its predecessor, the Drugs Unit, but it maintains a computerized information system, which is fed with data directly from the Member States. Furthermore, personal data can be stored with Europol, on condition that it is only used to investigate serious crime falling into Europol's competencies. In addition, personal data fulfilling these conditions can be processed to third countries and their authorities, subject to an international agreement or in a situation affecting vital interests of a Member State or if imminent danger must be averted.[22] The agreement with the third country must include provisions on the type of data to be transmitted, on its recipient and on the purpose for which it is required. Also, the question of liability in the case of unauthorized or wrongful processing of data needs to be regulated. Should these requirements be met, the transfer of data is possible, but limited to law enforcement agencies. However, these agencies are obliged to delete the transferred data as soon as they are no longer required for the specific purpose intended.[23]

Eurojust

Besides enhancing police cooperation, the Council of European Union, at its meeting in Tampere in 1999, decided to expand judicial cooperation in order to improve the fight against organized crime and agreed on the creation of an agency in which prosecutors, judges or police officers with comparable authority would join forces. To this end, Eurojust was established in 2002.[24] Article 3 of the Council Decision states that the purpose of Eurojust is to coordinate and facilitate investigations and law enforcement between the respective Member States' authorities. Article 4, in turn, provides that Eurojust's competence extends to the same forms of crime as that of Europol, but in addition Eurojust is mandated to deal with special forms of crime such as computer crime, fraud and corruption, money laundering as well as unlawful practices causing damage to the environment. Article 14 authorizes Eurojust to process personal data, but mandates maintenance of a minimum level of data protection as stipulated in the Council of Europe Agreement of January 28, 1981.[25] Furthermore, pursuant to Article 19 of the Council Decision, personal data must be deleted if it is wrong or incomplete. This also applies to personal data no longer required for the original purpose.

In order to ensure the effectiveness of police and judicial cooperation, Eurojust works closely with Europol and can exchange information to this end.[26] Moreover, Eurojust is empowered to conclude cooperation agreements, including provisions for the exchange of personal data, with third countries, competent institutions under the TEU/TEC, international organizations and law enforcement agencies of third countries, subject to approval by the Council.[27]

The coming years will determine if the judicial cooperation practiced through Eurojust will stand the test of time. In the long run, a truly effective information network between investigative and law enforcement agencies within the European Union can only be achieved by concluding a formal cooperation agreement between Eurojust and Europol, as envisaged in the Council Decision[28] and by giving those two agencies access to the SIS, as currently planned.[29]

Legal Instruments in the Fight against Terrorism

The danger posed by terrorist attacks carried out with nuclear, biological and chemical weapons, as well as conventional weapons, calls for determined action by all Western States; international terrorism can only be fought by extensive and optimized international cooperation.

European Level

As early as 1995 the EU-US Action Plan[30] was established to foster cooperation in the fight against the global threats of organized crime, terrorism and drug trafficking. On a European level, the Council of the European Union, at its Vienna meeting in December 1998, adopted an Action Plan for implementing the Amsterdam Treaty provisions on building an area of freedom, security and justice.[31] The Action Plan underscored the fight against terrorism as one of the EU's aims. Special emphasis was also placed on the central role of Europol as an important instrument of enhanced cooperation between the Member States. However, the measures foreseen in the EU Action Plan, as well as the existing measures intended to realize an area of security, e.g., provisions of the Schengen Regime and the Europol Agreement, did not prove to be effective; a fact that was tragically affirmed by the attacks of September 11, the planning of which took place in Germany and remained undetected. The new security threat called for advanced countermeasures on the part of both the European Union and the European Community, as well as at the national level in order to confer the necessary competencies upon the authorities responsible for protecting the population and fighting the latent danger.

Therefore, the Council of the European Union at its extraordinary meeting of September 21, 2001 agreed on an Action Plan specifically aimed at combating

terrorism, The Action Plan included enhanced police and judicial cooperation. These were to be facilitated by the introduction of the European Arrest Warrant (the creation of which had already been anticipated at the 1999 Tampere meeting), a uniform definition of terrorism, and the creation of a list of terrorist organizations, as well as the formation of joint investigation teams and of an anti-terrorism unit within Europol. In addition, it was decided that security measures for air transportation and quality controls for security at airports should be enhanced.

In fulfilling both UN Security Council Resolution 1373 of September 18, 2001 and the guidelines set out by the Action Plan of September 21, 2001, the Council adopted two Common Positions on combating terrorism and on the application of certain measures to this end.[32] According to an update of June 27, 2003, these Common Positions contain, in addition to a definition of "terrorist act," a list of 52 persons and 34 groups that are subjected to enhanced police and judicial cooperative scrutiny and whose funds and assets are to be frozen. Based on the Common Positions, the Council adopted a decision on police and judicial cooperation in criminal matters under Title VI of the TEU,[33] which defines the scope of administrative assistance in preventing and combating terrorist attacks. Thus, every Member State has to establish a specialized authority within its police service having access to all information relating to terrorist offenses. These authorities are then required to forward the information to Europol and Eurojust.

For the purpose of EC-wide implementation of the Common Positions, the Council of the European Union issued a Regulation "on specific measures directed against certain persons and organizations in combating terrorism."[34] The list attached to this Regulation names 26 persons and 23 organizations whose funds and other assets are to be frozen. The Regulation was subsequently extended,[35] pursuant to a Council of the European Union Common Position of May 27, 2002,[36] to specifically apply to persons and organizations connected to Osama bin Laden, the Al Qaida network and the Taliban. Since the Member States' national laws and measures were partially in need of improvement, the Council issued a decision in November 2002[37] aimed at reassessing those laws in order to attain higher efficiency in combating terrorism.

One legal instrument expected to show great effect in fighting terrorism is the European Arrest Warrant,[38] which is designed to replace the political and administrative phases of the old extradition process with one single court procedure. It constitutes the first palpable realization of the principle of mutual recognition in criminal law matters, which was agreed upon by the European Council in Tampere in 1999.

As regards criminal law, a 2002 Council Framework Decision[39] on combating terrorism is of vital importance, since for the first time a move towards harmonizing the Member States' criminal laws was made in the sense that minimum

standards for terrorist offenses and their elements, and for law enforcement, were defined. The need for such a decision becomes obvious when it is considered that as late as 2001, only six EU Member States had incorporated provisions on terrorist offenses into their criminal laws.[40] With this Framework Decision, the European Union has laid a foundation for a comprehensive system of combating terrorism, whereby the Member States' law enforcement agencies, assisted by Europol, Eurojust and the SIS, can improve the effectiveness of their investigations.[41] However, the Framework Decision has not been fully implemented into all Member States' national laws. As of March 2004, only eight Member States had implemented it, although Article 11 of the Framework Decision had set a deadline of December 21, 2002. This puts the events of March 11, 2004 in Madrid into an even more tragic light.

National Level

Measures to combat the terrorist threat have also been taken on the national level, principally through the implementation of EU decisions. This article will focus on Germany as an example. The German Law on Combating Terrorism, which came into force on January 1, 2002, created a statutory basis for further measures and for enhanced cooperation between the various existing German security authorities.[42]

The Federal Office for the Protection of the Constitution (Bundesverfassungsschutz), as one of Germany's principal security agencies, was tasked to investigate cases involving organizations opposed to the idea of international understanding and peaceful coexistence of peoples. That agency now has the power to demand information on bank accounts and their holders from banks or other financial service providers. Thus, financial transactions to and from organizations with extremist or suspicious attitudes can be disclosed and further support for those organizations cut off. In addition, further competencies for disclosure of information by telecommunication and mail service providers as well as airlines were created, some of which were transferred to the Federal Intelligence Service (Bundesnachrichtendienst) and to the Naval Intelligence Service (Marineabschirmdienst).[43] At the same time, all the measures just mentioned are subject to a strict control regime by impartial bodies.[44]

Another agency endowed with new investigative and executive authority is the Federal Office of Criminal Investigation (Bundeskriminalamt). That agency can now directly intervene in cases of information technology (IT) sabotage, as one of the potential fields of future terrorist attacks, without further consultation with other agencies. If it has an initial suspicion of an offense, it can now initiate its own investigations and use its own resources for gathering information, especially in

the areas of terrorism and IT sabotage, while working together closely with other security agencies.

The Federal Border Police (Bundesgrenzschutz) has been granted power for training and deploying armed sky marshals.[45] Furthermore, in the interest of air security, the provisions of the air transportation law were altered to allow the reinforcing of controls and quality standards at and around airports, as well as the use of military aircraft to shoot down hijacked airplanes as a last resort. The latter provision permits for the first time the deployment of the Federal Army (Bundeswehr) within Germany in other than disaster operations. It was passed against strong opposition. The need for such a competence became all too obvious on January 5, 2003 when a deranged man commandeered a motorized glider, circled over Frankfurt/Main for several hours and threatened to crash the plane into the building of the European Central Bank. Fortunately, the plane did not have to be shot down by the summoned F-4 pursuit planes—no legal basis existed for such an action then[46]—, since the perpetrator gave up after three hours and safely landed the plane. The reinforced control standards at airports now include checking the reliability of airport employees. To this end, the air security authorities can obtain unlimited disclosure of information from the Federal Central Register (Bundeszentralregister).[47]

Similarly, the Law on the Review of Security Measures introduced strict control and security measures in order to prevent sabotage of other vital or militarily important installations. In the future it will be possible to explore the personal and economic background of employees in nuclear plants and other focal points of critical infrastructure. The Federal Office of Criminal Investigation therefore keeps in close contact with the respective operators of the relevant facilities in order to update the security assessment and optimize both protective measures and the flow of information.[48]

This new and intensified investigative work resulted in 182 criminal investigations of individuals with Islamic backgrounds between September 2001 and February 2004. Seventy of those were led by the Federal Office of Criminal Investigation and 112 by the regional police (Landespolizeien), the latter maintaining a close cooperation with the competent federal authorities. The Federal Office of Criminal Investigation alone investigated 25,600 hints and traces, taking advantage of the changed provisions in the Code of Criminal Procedure (Strafprozessordnung), which allow a simplified procedure and advanced competencies for intercepting correspondence, including telephone, cell phone, and e-mail contacts. However, the Federal Constitutional Court (Bundesverfassungsgericht)[49] declared some portions of the latter competencies unconstitutional.

In order to guarantee an adequate and constitutionally sound criminal conviction, the German Criminal Code (Strafgesetzbuch) had to be adapted to the new

circumstances, therefore new provisions were inserted into the code. Previously only membership in a terrorist group constituted an offense, so that the courts could not adequately react to terrorism in its new, international dimension. With insertion of the new provisions into the Criminal Code it is now possible to convict foreign offenders—especially members of Al Qaida.[50]

The investigations initiated between 2001 and 2004 led to several severe sentences and some criminal proceedings are still under way. The weaknesses of the new provisions and the difficulty of their latent infringement of the rule of law, which is highly protected in Germany, becomes especially apparent in the case of Mounir al Motassadeq (a member of the Hamburg group of Al Qaida terrorists who prepared and carried out the attacks of September 11), whose verdict was overruled and remanded due to insufficient evidence.[51] Cases like that of Motassadeq demonstrate that all States have to join in a closer cooperation (in this case it was alleged that the United States had evidence it did not make available to the German court) so that the efforts of the single nation State in building up pressure against terrorist organizations through criminal convictions and adequate court sentences will produce the intended effect.

Before repression of crimes committed, however, comes prevention of terrorist attacks. Preventive measures on the federal level in Germany were taken, *inter alia*, in the field of financing of terrorist groups. Identifying the financial sources funding terrorists and preventing financial transactions are critical aspects of combating terrorism. Also in this area, the complexity and diversity of transaction paths call for coordinated cooperation of security agencies and the financial sector, on both national and international levels. On the multinational level, the Financial Action Task Force (FATF),[52] of which 30 States besides Germany are members, has adopted a total of eight special recommendations on combating the financing of terrorism. In August 2002, Germany became the first State within Europe to fully implement the guidelines of the FATF, as well as the corresponding provisions of EU directives on money laundering, into its national law.[53] That legislation assigns special importance to the role of the Financial Intelligence Unit (FIU) within the Federal Office of Criminal Investigation.[54] The FIU functions as a central office for investigative leads, for matching of international measures and for informing other national or European authorities about methods of fighting money laundering or other means of support for Islamic organizations. Nonetheless, finding evidence of planned financial support of terrorist attacks remains a very difficult task despite new competencies enabling authorities to acquire information on account holders and transactions from financial institutions. Still, principal features of transaction methods were successfully identified and cut off. Given the complex and shrouded paths of monetary transactions, further isolation of international terrorism's

financial sources requires intensive international cooperation among States and exchange of information between their respective counterterrorism authorities.

Border Controls

In addition to breaking up terrorist groups already existing within the European Union, preventing the entry of terrorists into the territory of EU Member States is another point of focus, and shall be the main one under scrutiny here. In this context, one needs to consider the fact that in a territory without internal customs and immigration borders, such as the greater part of the European Union due to the Schengen Regime, the State penetrated by a terrorist organization is not necessarily the State that is the target of attack.

The European Council is responsible for the adoption of uniform measures for control of the EU's external borders.[55] The Schengen Implementation Agreement (SIA) defines the external borders of the European Union as all land, sea and air borders of Member States that are not internal borders.[56] However, Member States are not precluded from concluding separate arrangements with third nations, as long as those agreements are in accordance with Community Law.[57]

Specific measures for the control of the EU's external borders are detailed in the SIA.[58] A Member State confronted with the entry of a third country national must comply with the SIA mandate that the security interests of all other Member States have to be taken into account pursuant to Community Law.[59] Therefore, third country nationals can be denied entry if they constitute a danger to the public order, national security or international relations of any Member State. To this end, the Member States have drawn up a common list of wanted persons, from which the names of individuals to be denied entry are transferred to the SIS and thereby made available to all Member States. In order to be put on this common list, persons have to fulfill the criteria set out in the SIA (prison sentence of at least one year, suspicion of having committed a serious crime, severe breach of entry and/or exit regulations),[60] and there has been compliance with national procedural rules.

All persons are subject to controls regarding their entry/exit, stay and work documents.[61] In every case, their identity must be verified.[62] Third country nationals are subject to a stricter control than EU citizens,[63] they generally have to submit to separate customs clearance procedures. In exceptional cases, i.e., for humanitarian reasons, if national interests or international commitments are concerned an individual Member State can grant entry to third country nationals irrespective of fulfillment of the requirements just mentioned. However, the entry in those cases is limited to the sovereign territory of the Member State concerned.[64]

External borders may only be crossed at border checkpoints and during their respective designated passing hours.[65]

In order to comply with the foregoing provisions, the Member States concerned must monitor the boundaries of the external border and deploy specially trained border patrols to this end.[66] The latter is quite a problem regarding the EU's new Eastern border, since border fortification and patrol are largely inadequate.

What is more, all available technical resources must be applied in identifying terrorists in order to achieve effective detection and defense against terrorism. In particular, the identity of visa applicants and other persons entering the territory of a Member State of the European Union must be effectively assessed, since reliable identification is the basis for all further measures. As far as passport and visa controls are concerned, responsibility is divided between the Council of the European Union and the Member States. The Council is responsible for establishing general rules governing short-term visas (up to three months).[67] Competence over long-term visas remains with the individual Member State. The Council has specified[68] those third countries whose nationals must be in possession of a visa in order to enter the European Union, as well as those countries that are exempt from visa obligations. In order to qualify for a visa waiver, third countries must fulfill certain criteria regarding illegal immigration, public order and security, especially danger of terrorist attacks. The EU's external relations do, of course, also play an important role in assessing whether a visa waiver will be granted. In certain cases, Member States can permit exemptions from visa obligations.[69]

The Council is also responsible for laying down procedural rules for the issuing of short term visas, particularly with regard to subject matter, jurisdiction of the issuing authority, and material requirements.[70] Jurisdiction for visa issuance lies with the diplomatic or consular representative of the Member State of destination.[71] Details can be found in the Common Consular Instruction (Gemeinsame Konsularische Instruktion) of the Common Handbook of the Schengen States.[72]

The Council also made provisions for the design of short-term visas.[73] The European Commission proposes the details of visa design. The security criteria for short-term visas include the appearance of an unforgeable visa and the information to be entered on it.[74]

In the area of seafaring, a Council of the European Union directive establishes registration formalities for ships entering and leaving ports of the Member States[75] (largely based upon an International Maritime Organization Agreement of 1965[76]), and on the issuance of visas at the border, including those for sailors in transit.[77] The latter prescribes reporting requirements of Member States' authorities responsible for visas in the case of signing in and signing off of ships lying in ports of the Schengen area. Additional qualifications for entry into the Schengen

area must be fulfilled between the competent authority and the shipping company/ shipping agent in order to obtain a visa at the border. These procedures guarantee the exchange of security-relevant information, in particular through the SIS, between the Member States.[78]

In the area of identification, special attention is accorded to biometrics. The registration of biometrical data (fingerprints, face, hand and iris screening) and their inclusion in passports or visas can allow for positive identification of notorious terrorists and violent enemies of Western societies, and therefore pave the way for appropriate countermeasures. Moreover, they constitute an effective means for allocating documents to their owner. On the EU level, the European Commission proposed introducing digitalized photographs into EU Member States' passports.

Germany envisages the use of biometrics in three important fields: border controls for entry, in visas and other residence permits, and in passports and national identification documents. The necessary amendments to the relevant laws (Pass- und Personalausweisgesetz) have already been enacted. Together with the use of biometrics, entry procedures can be extensively facilitated and accelerated by introducing an automated, computer-assisted border control process.[79] A corresponding pilot project began operation at Frankfurt airport at the beginning of 2004. However, the introduction of biometrical passports prescribed by the United States for maintaining the visa waiver program vis-à-vis EU citizens, is taking longer than expected. The initial deadline of October 26, 2004 was extended to October 26, 2005, and has now been extended for a second time. The current deadline is October 26, 2006. It is therefore undecided whether the former visa requirements for entry into the United States are going to be reintroduced.

Considering this development, the essential need for harmonizing the EU's external border controls on a high standard becomes all too obvious. It cannot be in the interest of the European Union to have terrorists circumvent the high-tech border controls of one Member State by entering a neighboring State not applying the same technical standards for border controls. What is more, the coordination among the States must include harmonizing the applied biometrical methods. Last but not least, biometrics is a relatively new technology subject to uncertainties and avoidable errors, which could be eliminated by joint efforts in exchanging information and experience between the States involved in the interest of an optimized outward protection. Germany, therefore, strives for greater cooperation in this area within the European Union, and with its G8 partners.[80]

Within the context of this cooperation, the forwarding of personal data on passengers embarked on transatlantic flights is a matter of current importance and needs to be mentioned here. As of February 5, 2003, and pursuant to the US Aviation Transportation and Security Act of 2001, the US Bureau of Customs and

Border Protection and the US Transportation Security Administration require airlines to provide access to so-called "PNR" (Passenger Name Record) data for international flights. Provision of this data by European Union airlines conflicts with European Union laws and regulations,[81] both because no specific authority therein allows for such transfer and because it has not been determined that the data will be "adequately protected" by the receiving authority as defined by European Community law.[82] What is more, US authorities, by accessing the personal data of EU citizens, encroach upon the sovereignty of EU Member States without being authorized to do so under public international law.

In order to both create a legal basis for the justified security interests of the United States and to ensure adequate data protection to which the EU citizens are entitled, the European Commission has proposed that an agreement be entered into between the European Community and the United States.[83] Such an agreement would meet the legal requirements of the European Community pertaining to data transfer and would justify the encroachment upon the Member States' sovereignty. Furthermore, the Commission has determined that the proposed agreement would guarantee adequate protection of personal data as mandated by the applicable European Parliament Directive.[84] The Council signed this agreement at the end of May 2004 over the protests of the European Parliament. The European Parliament argues that the agreement violates the Treaty Establishing the European Community,[85] since it purports to amend the relevant Directive[86] which, as a legal instrument adopted according to the procedure set forth in Article 251 of that treaty, requires European Parliament approval for amendment. Accordingly, the European Parliament has decided to bring the matter before the European Court of Justice. A majority of members of the European Parliament deems the right of access to PNR-data granted to US authorities to be too broad, since the agreement makes no reference to the extent of data protection mandated by European Community law,[87] especially with regard to a potential transfer of the data to third countries.

Although the basic criticism of granting a right of transferring personal data to the US authorities as being too far reaching may be justified, one needs to take into account the fact that the European Commission has obtained guarantees from the US Bureau of Customs and Border Protection in the form of a self-commitment[88] for appropriate use of the data and that the current state of affairs—transfer of personal data without any legal basis—is simply unacceptable.

Intrastate Countermeasures in Case of a Terrorist Threat

As soon as terrorists have been identified, either on the basis of European and international cooperation or as a result of the extended national competencies, further

procedures become the responsibility of the Member State concerned. Therefore, the authority to deny German visa and residence permits in a simplified procedure was enhanced by adapting the provisions of the 1990 Aliens Act (Ausländergesetz)[89] to accord with the Law against Terrorism (Terrorismusgbekämpfungsgesetze).[90] Enemies of society and its democratic foundations who are ready to use or appeal for violence in pursuing their goals are now explicitly prohibited from obtaining a visa. In addition, the use of unforgeable features in national identification documents and residence permits has been enhanced by legislation.

Since the provisions of the Asylum Procedure Act (Asylverfahrensgesetz)[91] have been amended so as to include registering fingerprints, photographs, and, in the future, biometrical data of asylum seekers, it is now possible to save voice recordings of asylum seekers, thus providing information on their country of origin. Furthermore, these data can now be stored for up to ten years after irrevocability of the asylum decision and can be processed by the police and security authorities for identification purposes in a simplified procedure. The main aim in this area is to standardize and simplify the procedure, as well as to make it more automatic, while maintaining an adequate level of data protection.

Pursuant to the new Immigration Act, which was finally agreed on in June 2004, after the first version had been declared unconstitutional by the German Supreme Court (Bundesverfassungsgericht) on formal grounds, an admitted asylum seeker who is a member of a terrorist organization or an organization supporting terrorists can be deported in a simplified procedure. The new Immigration Act[92] entered into force on January 1, 2005, and contains stricter rules on arrest and extradition of foreign terrorists or extremists endangering Germany's internal security. If extradition is impossible due to the potential of torture or implementation of the death penalty by the country of destination, notification requirements and constraints on the freedom of movement can be applied in order to maintain control over the potential danger.

Apart from the measures already taken on the basis of the EU Action Plan, Germany continues to campaign for further initiatives to enhance transnational cooperation within the Council of the European Union, especially on improving information flows, identification systems and searches for wanted terrorists (profile search). In this context, it needs to be mentioned that the success in combating cross-border terrorist networks depends on concerted and determined action of the international community. The cooperation within international organizations and fora, such as the United Nations, G8,[93] NATO or OSCE (Organization for Security and Co-operation in Europe)[94] is therefore of paramount importance. The Council Recommendation on joining the G8 network of contact points with 24-hour service for combating high-tech crime [95] is just one example of this

cooperation. In addition, bilateral agreements and informal cooperation in identifying, arresting, prosecuting and sentencing terrorists continue to be necessary on the international level. A further aim of the German Law against Terrorism is to protect the population as well as possible and to minimize the vulnerability of key points of infrastructure. However, the competencies created need to be used continuously and with determination. Particularly in the areas of air security and infrastructure protection, measures taken to date have brought about an easing of tension. Close cooperation between the Department of the Interior, other security authorities and the operators of key infrastructure facilities, as well as airlines, warrant both continuous updating on the threats faced and the development of suitable strategies for countermeasures.

While terrorist act prevention is the main focus of the measures addressed in this article, optimizing crisis management after a terrorist attack requires at least as much attention. Civil protection plays a central role in this context. According to an Action Plan of the German Department of the Interior, key infrastructure facilities, i.e., all organizations and institutions of vital importance for the population—especially energy and water facilities, the breakdown of which can cause a long lasting shortage of supply, material disturbance of public security and other dramatic consequences for the population and the State's structures—are the center of attention in this context. In the event of extensive catastrophes, attacks or other crisis situations, federal and regional (Länder) civil protection resources need to be combined. For this purpose, the new federal Bureau for Civil Protection (Bundesamt für Bevölkerungsschutz und Katastrophenhilfe) was created as a further pillar of national security. The new bureau began its work in May of 2004. It can avail itself of the Joint Information Center of the German Federal State and the Regions (Gemeinsames Melde-und Lagezentrum des Bundes und der Länder, (GMLZ)), which began operations in the autumn of 2002 and which can coordinate crisis management (both information and countermeasures) in the scenarios mentioned above.[96]

For information and warning purposes, the GMLZ can utilize the German Emergency Information System (Deutsches Notfallvorsorge-Informationssystem), which provides the public with precautionary information about rescue, evacuation and supply via the Internet and telephone hotlines. In the case of an extraordinary emergency situation (e.g., an attack on a nuclear plant), a satellite based warning system, in place since October 2001, can, within seconds, issue public warnings to be broadcast on all public television and radio stations. The Department of the Interior is currently engaged in the development of other possible warning systems, such as alerting phones or clocks, and coordinating protection measures. Together with its European neighbors, Germany is developing defense concepts and

participates in joint exercises that form part of the program on the improvement of cooperation in preventing and fighting terrorist threats of a chemical, biological, radiological or nuclear nature (e.g., EURATOX 2002, a simulation exercise involving radiological and chemical fallout resulting from a terrorist attack).

More attention is increasingly being paid to computer network attack, the relatively new form of information technology terrorism. Since most of the vital facilities of infrastructure—from traffic lights to nuclear plants—are computerized, defense against attacks on these systems, the consequences of which can be catastrophic, must have utmost priority. In Germany, the Federal Bureau for Security in Information Technology (Bundesamt für Sicherheit in der Informationstechnik) examines the potential sensitivity of critical infrastructure and prepares those systems for defense against terrorist interference by creating framework plans or by directly cooperating with the systems' operators.

The last element of the Department of the Interior's Action Plan is fighting terrorism at its roots. Defense against Islamic terrorism is most effective at its financial and ideological source. Isolating terrorists from their ideological and economic support should be not the last, but the foremost goal of both national and international measures in fighting terrorism.

Conclusion

The Coalition against Terror must cooperate closely in order to respond effectively to the new "asymmetric" threats our nations face today. But it needs also to advocate respect for and advancement of human rights in the countries that form the cultural base for international terrorism and to build up political pressure against oppressive regimes. By fostering democratic reforms and the development of the rule of law, as well as by handing over power to the oppressed peoples themselves, terrorist structures can more often than not be destroyed at the root, and true fanatics can be cut off from their sources. It is beyond doubt that international cooperation at its highest level in this area is of paramount importance. The European Union and its Member States take their international responsibilities seriously and are therefore involved in Operation Enduring Freedom in Africa and in the Gulf of Oman, are part of the Coalition against Terror in Afghanistan, and demonstrate great material and personnel commitment to the International Security Assistance Force for a sustainable pacification of Afghanistan.

The fact that the European Union is not the "United States of Europe," therefore having to share competencies and jurisdiction not with federated but sovereign States, creates some difficulties and sometimes delay in achieving the necessary measures. But there can be no doubt that the European Union and its

Member States will live up to their international responsibilities in the future and will remain a true and reliable partner of the Free World.

Notes

1. Oliver Lepsius, *Liberty, Security and Terrorism: The Legal Position in Germany*, 5 GERMAN LAW JOURNAL 436 (2004).
2. Otto Schily, German Secretary of the Interior, address at the opening of the 7th European Police Congress entitled "Fighting Terrorism and Protecting the Population" (Terrorismusbekämpfung und Bevölkerungsschutz), Bonn, Feb. 16, 2004.
3. Treaty on European Union, Maastricht, Feb. 7, 1992, Official Journal of the European Union (OJ 1992, C 191), Jul 29, 1992, full text *available at* http://Europa.eu.int/en/record/int/title7.html.
4. Naples Agreement on the Cooperation of Customs Services, Sep. 7, 1967.
5. See European Parliament Fact Sheet 4.11.3, Police and Customs Cooperation, which notes that:

> Formal police cooperation between the Member States' representatives began in 1976 with the creation of working parties known as 'Trevi groups.' Its main subjects were terrorism and the organization and training problems of police departments. By 1989 there were four working parties, on terrorism, police cooperation, organized crime and the free movement of persons, headed by a group of senior civil servants responsible for preparing decisions for the Council of Ministers. This system prefigured the intergovernmental structure set up by the Schengen agreements and the Treaty of Maastricht.

Fact Sheet 4.11.3 is *available at* http://www.europarl.eu.int/factsheet/4_11_3en.htm.
6. Single European Act, Sep. 9, 1985, Official Journal of the European Union (OJ 1987, L 169), Jun. 29, 1987, *available at* http://europa.eu.int/abc/obj/treaties/en/entr14a.html.
7. Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 14, 1985, Joint Ministerial Gazette, 1986, at 77.
8. Convention Applying the Schengen Agreement of 14 June 1985 Between the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, *available at* http://www.privacy.org/pi/intl_orgs/schenen_agreement.txt.
9. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Jun. 15, 1990, Official Journal of the European Union (OJ 1997, C 254/1), Aug. 19, 1997.
10. Schengen Convention Executive Committee Decision (SCH/Com-ex (97)) 24, Official Journal of the European Communities (OJ 2000, L 239/442), Sep. 22, 2000.
11. Council of the European Union Regulation No. 2424/2001 On the Development of the Second Generation Schengen Information System (SIS II), Official Journal of the European Communities (OJ 2001, L 328/4), Dec. 13, 2001.
12. Italy joined the Schengen Agreements in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, and Denmark, Finland and Sweden in 1996.
13. Treaty of Amsterdam Amending the Treaty of European Union, the Treaties Establishing the European Communities and Related Acts, Mar. 29, 1996, Official Journal of the European

Union (OJ 1997, C 340), Nov. 10, 1997, *available at* http://www.europarl.eu.int/topics/treaty/pdf/amst.en.pdf.
14. Treaty on European Union, *supra* note 3, art. 2.
15. *See* Treaty of Amsterdam, *supra* note 13, Protocol on the Incorporation of the Schengen-acquis into the EU framework.
16. *See* Official Journal of the European Communities (OJ 1999, L 176), Oct. 10, 1999; amended (OJ 2000, L9/32), Jan. 13, 2000.
17. Treaty Establishing the European Community, Mar. 25, 1957, full text of the treaty, as amended, *available at* http://europa.eu.int/abc/obj/treaties/en/entoc05.htm.
18. *Supra* note 3.
19. Arts. 61f and 29f, respectively.
20. Council of the European Union Joint Action, Mar. 10, 1995, Official Journal of the European Union (OJ 1995, L 62), Mar. 20, 1995.
21. Council of the European Union Act Drawing Up the Convention on the Establishment of a European Police Office, Jul. 26, 1995, Official Journal of the European Communities (OJ 1995, C 316), Nov. 27, 1995.
22. Council of the European Union Act Adopting Rules Governing Transmission of Personal Data by Europol to Third States and Third Bodies, Mar. 12, 1999, Official Journal of the European Communities (OJ 1999, C 88), Mar. 30, 1999.
23. Jan Ellerman, *EUROPOL auf dem Weg zu einem, europäische FBI"?, in* ZEITSCHRIFT FÜR EUROPÄISCHE STUDIEN 561 (2002).
24. Council of the European Union Decision Setting Up Eurojust With a View to Reinforcing the Fight Against Serious Crime, Feb. 28, 2002, Official Journal of the European Communities (OJ 2002, L 63), Mar. 6, 2002.
25. Council of Europe Convention for the Protection of Individuals with Regard to Automated Processing of Personal Data, Jan. 28, 1981, European Treaty Series No. 108.
26. Council of the European Union Decision, *supra* note 24, art. 26(1).
27. *Id.,* art 27(3).
28. *Id.,* art 26(1).
29. Council of the European Union Regulation No. 871/2004 Concerning the Introduction of Some New Functions for the Schengen Information System Including in the Fight Against Terrorism, Apr. 29, 2004, Official Journal of the European Union (OJ 2004, l 162/29), Apr. 30, 2004.
30. Joint EU-US Action Plan, Dec. 3, 1995, *available at* http://www.eurunion.org/partners/actplan.htm.
31. Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, Dec. 3, 1998, Official Journal of the European Communities (OJ 1999, C 19), Jan. 23, 1999.
32. Council of the European Union Common Position on Combating Terrorism, Dec. 27, 2001, Official Journal of the European Communities (OJ 2001, l 344/90, 2001/930/CFSP), Dec. 28, 2001, and Council of the European Union Common Position on the Application of Specific Measures to Combat Terrorism, Dec. 27, 2001, Official Journal of the European Communities (OJ 2001, L 344/93, 2001/931/CFSP), Dec. 28, 2001.
33. Council of the European Union Decision on the Implementation of Specific Measures for Police and Judicial Cooperation to Combat Terrorism in Accordance with Article 4 of Common Position 2001/931/CFSP, Dec. 19, 2002, Official Journal of the European Communities (OJ 2003, L 16), Jan. 22, 2003.

34. Council of the European Union Regulation No. 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities With a View to Combating Terrorism, Dec. 27, 2001, Official Journal of the European Communities (OJ 2001, L 344/70), Dec. 28, 2001.
35. Council of the European Union Regulation No. 881/2002 Imposing Specific Restrictive Measures Directed Against Certain Persons and Entities Associated With Usama bin Laden, the Al-Qaida Network and the Taliban . . . , May 27, 2002, Official Journal of the European Communities (OJ 2002, L 139/9), May 29, 2002.
36. Council of the European Union Common Position Concerning Restrictive Measures Against Usama bin Laden, Members of the Al-Qaida Organisation and the Taliban . . . , May 27, 2002, Official Journal of the European Communities (OJ 2002, L 139/4), May 29, 2002.
37. Council of the European Union Decision Establishing a Mechanism for Evaluating the Legal Systems and their Implementation at National Level in the Fight Against Terrorism, Nov. 28, 2002, Official Journal of the European Communities (OJ 2002, L 349/1), Dec. 24, 2002.
38. Council of the European Union Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, Jun. 13, 2002, Official Journal of the European Communities (OJ 2002, L 190/1), Jul. 18, 2002.
39. Council of the European Union Framework Decision on Combating Terrorism, Jun. 13, 2002, Official Journal of the European Communities (OJ 2002, L 164/3), Jun. 22, 2002.
40. Germany, France, Spain, Italy, Portugal and the United Kingdom.
41. *See* Eugenia Dumitriu, *The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, 5 GERMAN LAW JOURNAL 585 (2004).
42. Law on Combating Terrorism (Terrorismusbekampfungsgesetz), Jan. 9, 2002, Federal Law Gazette (BGBl. I 2002) 361–363.
43. *Id.* at 363, 364.
44. Lepsius, *supra* note 1.
45. *Supra* note 42, art. 6.
46. On June 18, 2004, the German Parliament adopted the Law on Adjustment of Air Security Tasks (Gesetz zur Neuregelung von Luftsicherheitsaufgaben – Luftsicherheitsgesetz), Federal Gazette (BGB.L I 2005) 78, which, in part, amended the Air Transportation law (Luftverkehrsgesetz), Federal Gazette (BGBI. I 1999) 550. In addition, in Article 14, paragraph 3 it provided authority to shoot down aircraft as a last resort. The Federal Constitutional Court (Bundesverfassungsgericht), however, annulled that provision on February 15, 2006 (Case No. 1 BvR 357/05, not yet published) for lack of constitutional competence and for violation of Article 2 (right to life) and Article 1 (human dignity) of the Constitution.
47. Air Transportation Law , as amended, *supra* note 46, art. 29d.
48. For a critical view on the adopted measures, see Verena Zöllner, *Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights,* 5 GERMAN LAW JOURNAL 469 (2004).
49. BVerfG first senate, judgement of Mar. 3, 2004, re.:1 BvR 2378/98, 1 BvR 1084/99, *reprinted in* NEUE JURISTISCHE WOCHENSCHRIFT 999–1022 (2004).
50. Lepsius, *supra* note 1.
51. Christoph Safferling, *Terror and Law—Is the German Legal System Able to Deal with Terrorism?—The Bundesgerichtshof (Federal Court of Justice) Decision in the Case Against El Motassadeq*, 5 GERMAN LAW JOURNAL 515 (2004).
52. Established in 1989, the Financial Action Task Force (FATF) is an intergovernmental body whose purpose is the development and promotion of policies, both at the national and international levels, to combat money laundering and terrorist financing. FATF information source is *available at* http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html.

53. Law on Combating Money Laundering (Geldwaschegesetz), August 2002, BGBI.
54. *Id.*, para. 5.
55. Treaty Establishing the European Community, *supra* note 17, art. 62(a).
56. Schengen Implementation Agreement, *supra* note 8, art. 1.
57. Treaty Establishing the European Community, *supra* note 17, art. 62(b).
58. Schengen Implementation Agreement, *supra* note 8, arts. 3–8.
59. *Id.*, art. 6(2).
60. *Id.,* art. 96(2).
61. *Id.*, art. 6(a).
62. *Id.*, art. 69(2)(b).
63. *Id.*, art. 6(2)(c).
64. *Id.*, art. 5(2).
65. *Id.*, art. 3.
66. *Id.*, art. 6(3) and (4).
67. Treaty Establishing the European Community, *supra* note 17, art. 62(2)(ii).
68. Council of the European Union Regulation No. 539/2001 Listing Third Countries Whose Nationals Must be in Possession of Visas When Crossing External Borders and Those Whose Nationals are Exempt, Mar. 15, 2001, Official Journal of the European Communities (OJ 2001, L 81/1), Mar. 21, 2001.
69. *Id.*, art. 4.
70. Schengen Implementation Agreement, *supra* note 8, art. 12(2)(b)(ii).
71. *Id.*, art. 12(2) and (3).
72. Decision of the Schengen Executive Committee on the Compilation of a Manual of Documents to Which a Visa May be Affixed, Apr. 28, 1999 (SCH/Com-ex(99)14), Official Journal of the European Communities (OJ 2000, L 239/298), Aug. 22, 2000, as amended by Council of the European Union Regulation No. 539/2001, *supra* note 68, art. 7.
73. Council of the European Union Regulation No. 1683/95 Laying Down a Uniform Format for Visas, May 29, 1995, Official Journal of the European Union (OJ 1995, L 164), July 14, 1995; as amended by Council of the European Union Regulation No. 334/2002 Amending Regulation No. 1683/95 Laying Down a Uniform Format for Visas, Feb. 18, 2002, Official Journal of the European Communities (OJ 2002, L 53/7), Feb. 23, 2002; last amended by European Union Act Concerning the Conditions of Accession of the Czech Republic, et al, and the Adjustments to the Treaties on which the European Union is Founded, Official Journal of the European Communities (OJ 2003, L 236/33), Sep. 23, 2003, at 718–725.
74. Council of the European Union Regulation No. 1683/95, *supra* note 73.
75. European Parliament/Council of the European Union Directive No. 2002/6/EC On Reporting Formalities for Ships Arriving In and/or Departing From Ports of the Community, Feb. 18, 2002, Official Journal of the European Communities (OJ 2002, L 67/31), Sep. 3, 2002.
76. Convention on Facilitation of International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411, T.I.A.S. 6251.
77. Council of the European Union Regulation No. 415/2003 On the Issue of Visas at the Border, Including the Issue of Such Visas to Seamen in Transit, Feb. 27, 2003, Official Journal of the European Union (OJ 2003, L 64/1), Mar. 7, 2003.
78. For more detailed information on port security, see Hans-Werner Rengeling, *Zur Sicherung der Seehäfen gegen terroristische Anschläge aufgrund neuer internationaler europäischer und deutscher Regelungen*, DEUTSCHES VERWALTUNGSBLATT 589 (2004).
79. Law on Combating Terrorism, *supra* note 42, arts. 7 and 8.

80. The G8 consists of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States.
81. *See* European Parliament/Council of the European Union Directive No. 95/46 On the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, Oct. 24, 1995, Official Journal of the European Communities (OJ 1995, L 281/31), Nov. 23, 1995, and Council of the European Union Regulation No. 2299/89 On a Code of Conduct for Computerized Reservation Systems, July 24, 1989, Official Journal of European Communities (OJ 1989, L 220/1), July 29, 1989.
82. European Parliament/Council of the European Union Directive No. 95/46, *supra* note 81, art. 25(1) and (2).
83. European Commission Staff Working Paper, An EC-U.S. Agreement on Passenger Name Record (PNR), SEC(2004)81.
84. E.g., European Parliament/Council of the European Union Directive No. 95/46, *supra* note 81, art. 25 (1) and (2).
85. Treaty, *supra* note 17, particularly art. 300 (1) and (2).
86. E.g., European Parliament/Council of the European Union Directive No. 95/46, *supra* note 81.
87. Particularly Article 8 of the European Convention on Human Rights, Nov. 4, 1950, *available at* http://www.hri.org/docs/ECHR50.htm; Article 6 (2) of the Treaty on European Union, *supra* note 3; and Article 286 of the Treaty Establishing the European Community, *supra* note 17.
88. *See* Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection (CBP), *available at* http://www.statewatch.org/news/2004/feb/08eu-CAPPS%20II.htm.
89. Aliens Act, July 9, 1990 (BGBI, 1354).
90. *Supra* note 42.
91. Asylum Procedure Act (Rev.), Bundesgesetzblatt (Federal Law Digest) BGBI. I, 1361), July 27, 2002, *available at* http://www.1uscomp.org/gla/statutes/AsylVFG.htm.
92. Immigration Act (Auswartigesetz), Bundesgesetzblatt (Federal Law Digest)(BGBI), Jan. 1, 2005.
93. *Supra* note 80.
94. The OSCE currently has 55 participating States.
95. Council of the European Union Recommendation On Contact Points Maintaining a 24-Hour Service for Combating High-Tech Crime, June 25, 2001, Official Journal of the European Communities (OJ 2001, C 187/5), July 3, 2001.
96. *See* Secretary of the Interior address, *supra* note 2.